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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1578

FILIPPO IVELI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that 18 U.S.C. 2510 *et seq.* are unconstitutional, (2) that interceptions of conversations on his telephone were not properly minimized, (3) that he was denied a hearing to explore whether antecedent interceptions on the telephones of third parties were properly minimized, (4) that the trial court erred in denying his motion for severance, and (5) that he was prejudiced by the admission of allegedly improper testimony by a co-conspirator.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of distributing and possessing with intent to distribute narcotic drugs, and conspiracy to do so, in violation of 21 U.S.C. 841(a)(1) and 846.[1] He was sentenced to three concurrent terms of two and one-half years' imprisonment and three years of special parole. The court of appeals affirmed without opinion (Pet. 16).

Prior to trial, the government made known its intention to offer recordings of conversations between petitioner and co-defendant Walters which had been intercepted during a sixty-day period of court authorized electronic surveillance of petitioner's home telephone. The warrants authorizing the interception of conversations over petitioner's phone were the last in a series of thirty-one eavesdropping warrants and renewal orders issued by various Justices of the Supreme Court of New York over a three-year period. The numerous warrants were interrelated in that the statements of probable cause in the applications for many warrants included transcripts of rele-

[1] Petitioner was acquitted on two other substantive counts of possession and distribution. Also charged in the indictment were co-defendants Salvatore Larca, Robert Mentrasti, James Johnson, John Boone, Kenneth Saunders and Ernest Walters. Mentrasti and Johnson pleaded guilty to the conspiracy count and testified at trial as government witnesses. Saunders and Walters were convicted of possessing and distributing heroin. All defendants, other than petitioner, were acquitted on the conspiracy count. Larca was also acquitted on the only other count in which he was named. The jury was unable to reach a verdict on six other counts.

vant conversations seized pursuant to the execution of earlier electronic surveillance warrants.

Petitioner and other defendants moved to suppress the conversations which had been intercepted over petitioner's telephone on the grounds that (1) the interception of innocent conversations on petitioner's phone had not been properly minimized and (2) the original warrant authorizing such interceptions was founded on a statement of probable cause which was tainted by the inclusion of material derived from antecedent wiretaps, which petitioner alleged to have been improperly executed. Following an evidentiary hearing, the trial court concluded that the interceptions on petitioner's telephone had been properly minimized and subsequently ruled that petitioner did not have standing to raise the minimization issue as to the antecedent wiretaps which were not directed against him (Tr. 760).

1. Petitioner contends, without supporting argument, that 18 U.S.C. 2510 *et seq.* are unconstitutional because "wiretapping violates the Fourth Amendment." This claim is insubstantial. Wiretapping is not unconstitutional *per se*, and lower courts have uniformly held that the challenged sections are constitutional. *United States* v. *Tortorello*, 480 F.2d 764 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Bobo*, 477 F.2d 974 (C.A. 4), petition for certiorari pending *sub nom. Gray* v. *United States*, No. 73-231; *United States* v. *Whitaker*, 474 F.2d 1246 (C.A. 3), certiorari denied, 412 U.S. 953; *United States* v. *Cox*, 462 F.2d 1293 (C.A. 8), cer-

tiorari denied, May 28, 1974, No. 72-5278; *United States* v. *Cox*, 449 F.2d 679 (C.A. 10), certiorari denied, 406 U.S. 934.

2. Petitioner's contention that the government failed to minimize properly the interception of innocent conversations over his telephone is also without merit. At the minimization hearing, the government offered the testimony of police officers Geberth and Schnurr, who participated in the electronic surveillance of petitioner's telephone.[2] Both officers testified that they were instructed to intercept and record only conversations that were deemed pertinent to the scope of the warrants. To that end, they were to intercept initially and record each conversation until a determination could be made of its character. If the call was deemed non-pertinent, recording and monitoring was to cease, except on a "spot-check" basis. Monitoring officers were directed not to monitor any "privileged" conversations (H. Tr., Vol. 2, pp. 5-6, 62).

Evidence at the hearing established that during the sixty days of surveillance of petitioner's telephone, 115 calls were intercepted. Petitioner was a party to all of the calls. Of these, the only calls which were not fully monitored and recorded were two

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[2] It was stipulated and agreed by all parties that the testimony of two other police officers whom the government intended to call to testify would be substantially the same as that of Officers Geberth and Schnurr (H. Tr., Vol. 2, p. 83). ("H. Tr." refers to the three-volume transcript of the September 10, 1973 hearing.)

calls between petitioner and an attorney, in which the interception ceased as soon as the monitoring agents realized the nature of the call (H. Tr., Vol. 2, pp. 7, 27). The remaining 113 conversations were monitored and recorded in their entirety. Sixty-four of these conversations lasted less than one minute (H. Tr., Vol. 2, p. 68).[3] The remaining 49 conversations were deemed pertinent at the time they were intercepted (H. Tr., Vol. 2, pp. 45, 85). Though the nature or subject of some of the calls was not apparent, they were deemed pertinent because of the guarded nature of the conversations, and the employment of code words frequently associated with the narcotics trade (H. Tr., Vol. 2, pp. 46, 72).

In light of this evidence and petitioner's failure to produce any evidence to contradict the government's showing of compliance with 18 U.S.C. 2518(5), the trial court correctly concluded that the monitoring agents properly minimized the interception of innocent conversations on petitioner's telephone. See *United States* v. *Manfredi*, 488 F.2d 588 (C.A. 2), certiorari denied, June 3, 1974, No. 73-1364.

3. Petitioner argues that he was improperly denied a hearing at which he could explore whether probable cause for the warrant authorizing the wiretap on his telephone was based on antecedent interception of the conversations of other persons, which, petitioner argues, may not have been properly mini-

[3] The remaining calls average only 3 to 4 minutes, since all 115 conversations consumed less than 203 minutes (H. Tr., Vol. 2, p. 67).

mized. During the execution of 28 prior wiretaps on the telephones of persons other than petitioner, the record discloses only one conversation to which petitioner was a party. That conversation between petitioner and one George Bove was intercepted pursuant to a court authorized wiretap on the latter's phone. The seventeen-line transcript of that conversation was included in the 23-page affidavit of Detective Anthony Gustitus in support of the application for a warrant for surveillance on petitioner's phone. Petitioner requested the trial court to conduct an evidentiary hearing to determine whether the Bove wiretap and apparently the other wiretaps had been properly minimized. The court denied the motion on the ground that petitioner lacked standing to raise the minimization issue with respect to taps on the telephones of third parties (Tr. 760).

As to the wiretaps in which petitioner was neither "a person against whom the interception was directed," or "a party to" any intercepted conversations, he clearly lacked standing to raise the minimization issue. See 18 U.S.C. 2510(11) and 18 U.S.C. 2518(10)(a). As to the one wiretap where petitioner was intercepted, there is recent authority to indicate that he did have "standing" to raise the issue of minimization as to that wiretap. See *United States* v. *Scott*, No. 71-1702, decided June 27, 1974 (C.A.D.C.). Even assuming, however, that the trial court erroneously denied petitioner standing, and assuming that petitioner could have shown that the Bove wiretap had been improperly minimized, peti-

tioner could not have obtained suppression of all the challenged material. At most petitioner would have been entitled to the suppression of the one conversation cited in the affidavit establishing probable cause for the issuance of the warrant authorizing interceptions on his telephone. *United States* v. *Scott*, *supra*, slip op. at 6, n. 5. It is clear, however, that there was ample independent evidence supporting the warrant authorizing the tap on petitioner's telephone. Detective Gustitus' lengthy affidavit disclosed an overwhelming basis for believing that petitioner was a major narcotics dealer apart from the brief and cryptic conversation between petitioner and Bove. Conversations between petitioner's confederates Miritello and Bove indicated that he supplied both of them with narcotics and that he had recently reduced his prices (Gustitus Affidavit, pp. 3-11). Physical surveillance of petitioner had disclosed his participation in two apparent narcotics transactions (*id.* at 16-19), and a previously reliable informant stated that he had personally discussed major narcotics transactions with petitioner by telephone (*id.* at 19-21). Thus, regardless of the inclusion of the hypothetically tainted conversation in the application for the warrant, the wiretap on petitioner's phone was properly authorized. See *United States* v. *Garcilaso de la Vega*, 489 F. 2d 761 (C.A. 2); *United States* v. *Friedland*, 441 F. 2d 855, 860 (C.A. 2), certiorari denied, 404 U.S. 867. *United States* v. *Scott*, *supra*, slip op. at 3, n. 2.

4. Prior to trial, both petitioner and co-defendant

Larca moved for severance on the grounds that each might wish to call the other as a witness at trial. The motion was denied as premature. Thereafter, the motion to sever was renewed during trial and in a brief hearing outside the presence of the jury both petitioner and Larca stated that if called as witnesses they would invoke their Fifth Amendment privilege against self-incrimination (Tr. 1103-1106). The motion for severance was again denied. Petitioner argues that he was prejudiced by the action of the trial court in denying his motion. Petitioner fails to show how he was prejudiced, other than by stating that Larca's testimony "could be extremely helpful" (Pet. 12), and there is nothing to indicate that Larca would have been willing to testify at a separate trial. To require severance on such an insubstantial basis would effectively preclude joint trials of co-defendants, and the trial court properly exercised its discretion in denying petitioner's motion. *United States* v. *Wyler*, 487 F.2d 170, 173 (C.A. 2); *United States* v. *Somers*, 496 F.2d 723 (C.A. 3).

5. Near the completion of the direct testimony of Frank Fonte, an unindicted co-conspirator who cooperated in the investigation and testified at trial, government counsel stated that Fonte was prepared to testify as to threats made by petitioner after his arrest and release on bail (Tr. 241-243).[4] Petitioner

[4] According to Fonte, petitioner told him that he was praying for Fonte's life, because "his man" wanted to get rid of him (Tr. 584).

objected to the proferred testimony on the grounds of surprise, and the court eventually ruled that the testimony would not be admitted (Tr. 246, 262).

On cross-examination, defense counsel inquired extensively into such matters as whether Fonte was "scared" of the agents (Tr. 305-306), whether he was getting paid by the government while he was in "hiding" (Tr. 407-408), and how often he saw the agents after his release. The court then ruled that the testimony concerning the threats was admissible on redirect examination (Tr. 576).

A careful reading of the challenged testimony in the context of all the evidence makes clear that the threat was really made by defendant Larca and that at worst petitioner was merely passing it along for "his man" (Tr. 571, 584). In view of Larca's acquittal on all counts, petitioner's characterization of the threat as "very dangerous and prejudicial testimony" (Pet. 13) is not persuasive. In any event, "evidence of conduct designed to impede or prevent a witness from testifying is admissible as showing consciousness of guilt." *United States* v. *Alberti*, 470 F.2d 878, 882 (C.A. 2); *United States* v. *Cirillo*, 468 F.2d 1233, 1240 (C.A. 2), certiorari denied, 410 U.S. 989.[5]

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[5] Petitioner's argument that the government was obligated by *Brady* v. *Maryland*, 373 U.S. 83 to reveal the threat in advance of trial is misplaced. Evidence of threats to potential government witnesses is not exculpatory within the meaning of *Brady*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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